IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1081 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDUL RAOOF ABDUL KADER SHAIKH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JB PARDIWALA with MR SHAUKAT A SHAIKH for the appellant.
MR KP RAVAL, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 22/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. Present appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Court No.4, Ahmedabad, in Sessions Cases Nos. 45 and 46 of 1998, whereby present appellant-Abdul Raoof Abdul Kader Shaikh came to be convicted for offences punishable under Section 302 of Indian Penal Code and Sections 25(1)(f) and 27 of the Arms Act, and accused-Gulammohmad alias Gulal alias Aarif Abdulla Shaikh came to be acquitted for the said offences.

1.1 The charges against the appellant and acquitted accused Gulammohmad were of having entered into a criminal conspiracy for the murder of Ganibhai Usmanbhai Chandmiya and of having murdered the said Ganibhai on 1st October, 1994, at about 1.45 P.M., near Honest Cold Drink House in Dariapur area of Ahmedabad, after going there on a motorcycle and firing shots at the deceased.

2. The Trial Court tried the two Sessions cases together as they were arising out of the same incident. The appellant was accused in Sessions Case No.45 of 1998 whereas the acquitted accused, Gulammohamad was the accused in Sessions case No.46

of 1998. The Trial Court came to a conclusion that the prosecution was not successful in establishing the charges against Gulammohamed alias Gulal alias Aarif Abdulla Shaikh and recorded his acquittal whereas it came to a conclusion that the offence of murder simpliciter was proved to have been committed by the appellant so also the offences under the Arms Act. The Trial Court awarded imprisonment for life for the offence of murder and imposed a fine of Rs.10,000/-, and in default thereof, to undergo simple imprisonment for three months. For the offence punishable under Section 25(1)(b) of the Arms Act, the Trial Court awarded rigorous imprisonment for two years and imposed a fine of Rs.2000/-, and in default thereof, to undergo simple imprisonment for one month. For the offence punishable under Section 27 of the Arms Act, the appellant is awarded rigorous imprisonment for three years and imposed a fine of Rs.3000/-, and in default thereof, to undergo simple imprisonment for one month. The learned Trial Judge directed the sentences to run concurrently. Being aggrieved by the said judgment and order, present appeal is preferred by convict-Abdul Raoof Abdul Kader Shaikh.

3. We have heard learned Advocate, Mr. J. B. Pardiwala, for the appellant and learned Additional Public Prosecutor, Mr. Raval, for the respondent-State. The record and proceedings are before us and we have been taken through the record and

proceedings by both of them.

4. Learned Advocate, Mr. Pardiwala, has raised following contentions :-

(1) That there is no direct evidence in the matter and the case rests on circumstantial evidence.

(2) That the discovery of weapon by the appellant is one of such circumstances, but it could not have been the foundation of the prosecution case in absence of any other independent evidence to connect the appellant with the crime.

(3) That the discovery Panchnama, if examined, would reveal that it does not disclose the authorship of concealment to the appellant-accused. That the discovery Panchnama was drawn during the course of investigation in another offence registered with Gomtipur Police Station at Crime Register No.I-149 of 1995 and, in the trial of that offence, the Court has not believed this Panchnama.

(4) That the disclosure allegedly made by the appellant was in the month of November, 1995, whereas the appellant was in custody from May 1995, though in another offence.

(5) That there is no evidence to show the ownership of the place of recovery of weapon or to show that the said property was in exclusive possession or under exclusive control of the appellant. On the contrary, the evidence is that there were several other persons who were occupying the said house.

(6) That it cannot be believed that a man would retain such a weapon in his house for such a long time when it is an important clue of a crime.

(7) That the prosecution has adduced evidence of two witnesses whose statements were recorded by learned Metropolitan Magistrate under Section 164 of the Code of Criminal Procedure. It was contended that these witnesses have retracted from their original stand and have not supported the prosecution. Though the learned Metropolitan Magistrate who recorded the statement was examined, he has proved only the recording part and not the contents. Those witnesses who did not support the prosecution case have been examined by the learned Public Prosecutor, but contents of the statements were not proved and brought on record the and, therefore, on record of the Court, the contents of the statements are not there.

(8) It was further contended that statements under Section 164 of the Code of Criminal Procedure have been held to be not a substantive piece of evidence and they can be used only to contradict or corroborate the witness.

(9) That the prosecution has not been able to establish the link between the accused and the offence in the sense that there is no evidence to show that the weapon was used by the appellant in commission of the offence in question nor are there circumstances which would lead to a legitimate inference that the appellant must have used the weapon for commission of the offence.

(10) That, if the entire prosecution case is seen, the original case was that of conspiracy, which the prosecution failed to establish and the Trial Court also did not accept it. The case was that there were two assailants who were on a motorcycle, one of whom was the present appellant who fired shots at the deceased and the other was the acquitted accused. If the case of conspiracy or common intention is not believed by the Trial Court, then in absence of any other cogent material, conviction could not have been recorded.

(11) That the Trial Court has committed an error in arriving at a presumption that because the weapon was recovered by the accused, it was used by him for the commission of the offence. The Trial Court overlooked the aspect that there were 13 months between the date of offence and the date of recovery. The Trial Court also overlooked the aspect that the appellant was in jail for last about six months.

Learned Advocate, Mr. Pardiwala also submitted that, as the weapon was discovered by the accused, it was presumed to have been used by him in the commission of the offence. But there are no connecting circumstances from which a legitimate inference can be drawn that it was the appellant alone who must have used the weapon in commission of the offence. Guilt of the accused is not the solitary and conclusively established hypothesis and, therefore, the Trial Court committed an error in recording conviction. Learned Advocate, Mr. Pardiwala, relied on certain decisions, which we propose to consider in the paragraphs to follow while discussing the evidence.

5. Learned Additional Public Prosecutor, Mr. Raval, submitted that when making and recording of statements under Section 164 of the Code of Criminal Procedure are established;

when there is evidence to establish that it was read over to the witness and the witness admitted the same and when the statements are accepted on record, it would amount to proof of contents of the statements and the Court may look into those statements.

5.1 Mr. Raval also contended that the discovery by the appellant is duly established. The discovery is from his residence and from a cupboard on 2nd Floor and only the appellant could have knowledge about the same. It is the case of the defence that the appellant knew about the existence of this weapon's author because he was so informed or because he had seen somebody concealing the weapon and, therefore, an inference may be drawn about the authorship of concealment being of the appellant. It was submitted that the weapon was sent to F. S. L. expert's opinion along with cartridges recovered from the place of incident and from the body of the deceased and a specific opinion has been expressed that they were cartridges of bullets fired from the weapon in question, i.e. muddamal Article No.28. Mr. Raval, therefore, submitted that there is discovery of a weapon by the accused which is concealed by him and there is evidence to show that the weapon discovered was the weapon which was used in commission of the offence. The necessary inference would be that it was the appellant who used the weapon at the time of commission of the offence and, therefore,

the conviction is well founded and deserves to be sustained. Mr. Raval submitted that it is true that independent witnesses in the form of discovery Panch and the witnesses whose statements under Section 164 were recorded have turned hostile, but the execution of Panchnama is proved through the Investigating Officer. He is a Government Officer and has no axe to grind against the appellant. There is no reason for him to falsely implicate the appellant. Similarly, the factum of recording of statement under Section 164 of the Code of criminal Procedure is also established through deposition of the Metropolitan Magistrate. The statements are very much on record and may, therefore, be looked into. The prosecution has, therefore, established the complete chain of circumstances to link the accused with the crime and, therefore, the appeal may be dismissed confirming the conviction.

6. At the outset, we may state that except the Metropolitan Magistrate, police witnesses and the medical witnesses all other witnesses have not supported the prosecution case and were treated as hostile to the prosecution. In the instant case, the case depends on circumstantial pieces of evidence and there is no direct evidence to connect the appellant with the crime. The circumstances on which the prosecution has relied on to substantiate the charges against the appellant are that the appellant discovered firearm muddamal Article No.28 from his

house in presence of Panch witnesses. That firearm, on being sent to the F. S. L. for inspection, is certified to be the weapon which fired the fatal shorts on the deceased at the time of the incident.

6.1 Witnesses-Saiyed Iftekhar Hakizudin Saiyed (Exhibit 34) and Mohmad Aarif Mohmad Hanifkhan (Exhibit 35) are the witnesses through whom an extra-judicial confession made by the appellant before them is sought to be established. The prosecution has, thus, tried to show that the appellant made an extra-judicial confession that he discovered the weapon and that there is ballistic expert's report which says that this very weapon was used in firing the fatal shots at the deceased.

7. As stated earlier, we find that most of the witnesses have turned hostile and, therefore, both the discovery Panch witnesses as well as Saiyed Iftekhar Hakizudin Shaikh (P.W.3-Exhibit 34) and Mohmad Aarif Mohmad Hanifkhan (P.W.4-Exhibit 35) have turned hostile. Witness-Rasheed Husain Abdul Razak (P.W.9-Exhibit 48), who was examined by the prosecution to show that the appellant had handed over two revolvers and cartridges to Ashrafkhan has also not supported the prosecution case and has turned hostile. Statement of this witness is also got recorded by learned Metropolitan Magistrate under Section 164 of the Code of Criminal Procedure like P.Ws. 3 and 4.

8. We find from the judgment of the Trial Court that the learned Trial Judge has placed reliance on discovery of the weapon by the appellant and on the ballistic expert's report and has come to a conclusion that because the weapon was discovered by the appellant, he was the person who could have used the weapon and ballistic expert's report indicates that this was the weapon used in commission of the crime and, therefore, the Trial Court has recorded conviction.

9. This Court, therefore, would be required to examine whether the evidence led by the prosecution establishes the complete chain of circumstances connecting the appellant with the crime and whether those circumstances are proved by cogent and reliable evidence.

10. In order that the evidence may be properly appreciated, certain basic facts of the case are required to be considered. The incident in question occurred on 1st October, 1994, at about 13.45 hours at the STD/PCO Cabin of Honest Cold Drinks situate at Popatiyawad of Dariapur area of Ahmedabad city. One Usmangani alias Hasubhai Shaikh was shot dead by two persons, who came there on motorcycle. The said two persons were, according to the prosecution, the present appellant and the acquitted accused,

Gulammohmad alias Gulal alias Aarif Abdulkader Shaikh. As per the prosecution case, the motorcycle was driven by the acquitted co-accused and the appellant was the pillion rider who fired shots at the deceased and one of the bullets hit the deceased, which caused his death. As per the prosecution case, the two accused persons had entered into a criminal conspiracy and, pursuant thereto, committed the offence. The F. I. R. was lodged by one Mohmad Farooq Rahimbhai Shaikh, but he did not disclose names of the assailants. He described the physical appearance of the assailants and the manner in which the incident occurred. On the basis of the F. I. R. before Dariapur Police Station, offence was registered and investigation started. However, as the culprits could not be detected, the Investigating Officer filed Summary "A".

10.1 Present appellant came to be arrested in connection with Gomtipur Police Station C.R.-I No.149 of 1995. While he was in police custody in connection with Gomtipur Police Station offence, he made certain disclosures, on the basis of which a discovery Panchnama under Section 27 of the Evidence Act was drawn and two fire arms (revolvers) came to be discovered at the instance of the appellant from his house No.1212 of Karoda Pole, Dariapur area from a steel almirah placed on the second floor of the house. The appellant came to be arrested in connection with the present offence on the basis of certain information received by the

police. The investigation was reopened/restarted. The bullets recovered from the place of incident and from the body of the deceased along with the revolver, muddamal Article No.28, discovered by the appellant were sent to F. S. L. for the opinion of ballistic expert, who opined that the bullet recovered from the body of the deceased was fired from the revolver, muddamal Article No.28, discovered by the appellant. Statements of three witnesses, P.Ws. 3, 4 and 9 were recorded by the Investigating officer, which reveal that the appellant had made extra-judicial confession and transferred the possession of the weapon. Statements of these three witnesses were also recorded by the Metropolitan Magistrate under Section 164 of the Code of Criminal Procedure, so also statement of Jahangir Marzaban Patel, who was accused No.3 in Sessions Case No.45 of 1998. The said accused filed application (Exhibit 5) for discharge, which came to be allowed by order dated 7.4.1998 and, ultimately, the charge sheet came to be filed against the appellant and co-accused, Gulammohmad alias Gulal alias Aarif Abdulla Shaikh vide Exhibit 7 on 7.4.1998. Both the accused pleaded not guilty to the charge and claimed to be tried.

11. From the record, we find that, following witnesses have not supported the prosecution case and are treated as hostile :-

(1) P.W.3-Saiyed Iftekhar Hafizuddin Saiyed (Exhibit 34).

(2) P.W.4-Mahmad Aarif Hanifkhan Pathan (Exhibit 35).

(3) P.W.5-Rajesh Amratlal Parmar (Exhibit 40).

(4) P.W.6-Mahamad Rafik Mahamad Hanif Shaikh (Exhibit 43).

(5) P.W.8-Shaukat Hussein Gulam Ahmed (Exhibit 46).

(6) P.W.9-Rashid Husein Abdul Razak (Exhibit 48).

(7) P.W.10-Maheshbhai M. Jantani (Exhibit 53).

12. The first question that we propose to deal with is whether the statements of Prosecution Witnesses 3, 4 and 9 recorded under Section 164 of the Code of criminal Procedure by the learned Metropolitan Magistrate can be used against the appellant herein. P.Ws. 3, 4 and 9 have not supported the prosecution case and have denied to have made any statement connecting the appellant with the crime. During cross-examination, they said that the statements before the learned Magistrate were made under coercion by the police.

12.1 The prosecution has examined the Metropolitan Magistrate, who recorded the statements. He is P.W.2 at Exhibit 18. He says that on 6.4.1996, witness-Mahmadarifkhan Mahmad Hanifkhan Pathan was brought to him with report Exhibit 20. He interrogated the witness regarding recording of statement and the witness indicated that he wanted to give a statement regarding whatever he knew. The witness was presented before him at 6.00

in the evening while he was in his chamber and he recorded the statement in his chamber itself. The concerned police officers were sent out of the room before recording the statement. Oath was administered and the statement of the witness was dictated by the learned Magistrate to his Stenographer, who recorded the same as per his dictation. The whole statement was read over to the witness after it was completed and the witness accepted the same. Thereafter, he obtained signature of the witness on both the sides of the pages. He also put his signature and designation. He identified the statement which came to be exhibited at Exhibit 21.

12.2 The witness then says that on 16th January, 1996, at 5.45 P.M., witness-Iftekhar alias Chhotu Hakizudin Saiyed was brought before him by Police Inspector, ATS, for recording statement under Section 164 of the Code of Criminal Procedure. He called the witness on the next day. On 17th January, 1996, the said witness was produced before him. He was interrogated and he expressed his willingness to give his statement. The statement given by the witness to the Magistrate was dictated by the Magistrate to his Stenographer, who typed the same as per his dictation. It contains the signature of the witness as well as his own signature and that statement is exhibited at Exhibit 24.

12.3 The witness says that on 8th April, 1996, at about 5.30

P.M., witness-Rasheed Husain alias Dolar Abdul Razak was produced before him by Police Inspector, ATS. He also expressed his willingness to give statement and, therefore, the witness recorded the statement of the said witness-Rasheed Husain and obtainted his signature. He says that all these statements were placed into an envelope and sent to the concerned judge in a concealed cover. The cross-examination of this witness reveals that the witnesses told him that they were brought from their home.

13. A look at the deposition of Saiyed Iftekhar Hakizudin Saiyed (P.W.3-Exhibit 34) would indicate that he has not supported the prosecution. He admits that police recorded his statement, but states that the said statement was given under coercion. He states that on 17th January, 1996, he was taken to the Court of learned Metropolitan Magistrate and his statement was recorded. He was, therefore, treated as hostile witness. During cross-examination to learned Public Prosecutor, he denied the suggestion of Raoof (appellant herein) handing over a bag containing revolver and cartridges to Aarif. He denies the suggestion that Abdul Raoof had asked him to preserve the revolver and cartridges and, thereafter, Abdul Raoof told him that he had committed murder of Ganibhai with that revolver as Ganibhai was police informant. This witness denies the suggestion that he had made same statements before the police as well as Metropolitan Magistrate. He denies to have made

statement before the learned Metropolitan Magistrate on 17th April, 1996, as per the contents of Exhibit 24-statement, as recorded in paragraph 6 of the deposition. The witness has been cross-examined on behalf of the accused where he admits that he was beaten by Police and was asked to sign the statements before the Magistrate, failing which he and his brothers also would be arraigned as accused. He accepts the suggestion that he was taken to the learned Metropolitan Magistrate by Police from the ATS Office. He was also asked not to say anything about being beaten by the police.

13.1 Deposition of P.W. 4-Mahmad Aarif Hanifkhan (Exhibit 35) is on the same lines where he denies the suggestion that he stated before the learned Magistrate that Raoof had come to him with two revolvers and cartridges and stated before him that he along with Dulal had committed murder of Ganibhai with the help of the revolver and cartridges. He admits his signatures on Exhibit 21 before the learned Magistrate. He denies to have made any statement before police on 3.4.1996 containing the above aspects. During cross examination, he accepts a suggestion that he gave statement under police coercion and threat of involving in the case.

13.2 P.W.9-Rasheed Husain Abdul Razak (Exhibit 48) has also resiled although he admits to have gone to Metropolitan

Magistrate on 8th April, 1996 and given statement. He admits his signatures on Exhibit 29 so also his left thumb mark. The contents of the statement Exhibit 29 are put to him during cross-examination to the Public Prosecutor, which he denies to have stated before the Magistrate. During cross-examination to the learned defence counsel, he says that he and his wife were called on 7.4.1996 in the office of Anti-Terrorist Squad and when he was taken to the Magistrate for statement, his wife was detained in the ATS office. He stated that he was threatened that, if he does not give the statement as desired, he and his wife would be involved in the case.

13.3 If the evidence of the Metropolitan Magistrate, Kashiram Joitaram Patel, (Exhibit 18) is read in context of this deposition, we find that the learned Magistrate indicates that he had satisfied himself that the witnesses were not giving the statement under threat or pressure or coercion. He states that he had recorded the statements as given by the witnesses and obtained their signatures. He also states that the statements were recorded as given by the witnesses, but we find that contents of none of the three statements recorded by the learned Magistrate are stated by the Magistrate in his deposition. He does not state as to what was stated by which witness.

14. Thus, in our opinion, the situation that emerges is that

the witnesses deny to have made the statements, Magistrate says that he did record the statements, but he does not state the contents of the statements, although the statements are produced on record.

14.1 The Court has to examine whether these statements can be made use of against the accused-appellant. In this regard, we may refer to a decision of the Bombay High Court in the case of ***Audumbar Digambar Jagdane v. State of Maharashtra, 1999 Cri. L.J. 1936***, where a Division Bench of the Bombay High Court took a view, on the basis of decision rendered by Privi Council reported in *AIR 1946 PC 38*, that a statement given under Section 164 of the Code of Criminal Procedure, even if proved, cannot be accepted as a substantive piece of evidence. Sir John Beaumont, J., in the above referred Privi Council decision observed "*...The learned Judges discussed in great detail the statements made by Haliman and Mahabir under Section 164 and gave reasons for accepting the facts, or most of the facts, deposed in those statements, in preference to th evidence given by the witnesses in Court , which in no way helped the prosecution. This was an improper use of such statements. A statement under Section 164 can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witnesses is false. But that does not establish that what he stated out of Court under*

Section 164 is true.”

14.2 The Apex Court in the decision reported in *(1972) 3 SCC 280*, in paragraph 8, has observed that a statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness.

14.3 In the case on our hand, we find that the witnesses who made the statements under Section 164 of the Code of Criminal Procedure before the Magistrate have, in their depositions, not supported the prosecution case and have not stated anything about the contents of those statements. The statements made by P.Ws. 3, 4 and 9 before the learned Magistrate, therefore, cannot be used as they are not substantive pieces of evidence and the witnesses have not supported the prosecution case by proving contents of those statements. The statements on record cannot be looked into to know the contents and we do not have details of statements in form of oral evidence of the witness making the statement or in form of deposition of learned Metropolitan Magistrate, who recorded the same.

14.4 Even if the statements are looked into, they can be used only for corroboration or contradiction. But mere making of

such statements would not establish that what is stated out of Court by the witnesses in those statements is true. Contents are to be examined for their truthfulness. If we examine the statements from that angle, we find that it was put to P.W.3 that he stated in his statement before the Metropolitan Magistrate (Exhibit 24) that Raoof had approached him in the month of July 1995 and told him that he wanted to take back the two revolvers and cartridges which he had given to Aarif and, therefore, find out Aarif. Against this, if we see deposition of P. I. Bhimsing Gulabsing Khant (Exhibit 62), we find that the appellant was arrested on 5.5.1995 in connection with Gomtipur Police Station C.R. No.149 of 1995 and was in judicial custody thereafter and was obtained by Investigating Officer-Khant, by a transfer warrant from Central Prison at 19.35 hours on 1.8.1995. Therefore, in the month of July 1995, the appellant was in prison in connection with Gomtipur C.R. No.149 of 1995 and this fact would falsify the case of P.W.3, as emerging from his statement under Section 164 of the Code of Criminal Procedure, that Raoof had approached him in July 1995. Of course, P.W.3 has denied to have made such a statement, but even if it is assumed that he did make such a statement, that statement does not pass the test of truthfulness.

14.4.1 Incidentally, we may also refer to paragraph 8 of the memorandum of arguments filed by the learned Public Prosecutor

before the Trial Court where it is indicated that the witnesses, who made statements under Section 164 of the Code of Criminal Procedure before the Metropolitan Magistrate, have turned hostile and under those circumstances, the case hinges upon circumstantial evidence.

14.5 Once the statements under Section 164 of the Code of Criminal Procedure get out of the zone of consideration of evidence as discussed above, what remains before the Court is the discovery Panchnama and the ballistic expert's report.

14.6 In this regard, if we see the Panchnama at Exhibit 65, the said Panchnama was drawn in presence of Maheshbhai Mansinh Dantani and Rajendrabhai Kallumali Koli. Out of these two persons, Maheshbhai Mansinh Dantani (P.W.10) is examined at Exhibit 53. He did not support the prosecution case and was treated as hostile witness. The other person, Rajendra Kallumali has not been examined by the prosecution.

14.7 What emerges from the evidence in the form of Panchnama is that the appellant stated to the effect that "*Come. I will show you the weapon with which I had fired.*" This statement does not indicate that the appellant indicated anything about his involvement in concealment of the weapon. Mere discovery cannot

be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source. He may have even seen somebody concealing the weapon and, therefore, it cannot be presumed or inferred that because a person discovered a weapon, he was the person who concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the Panchnama and the evidence in this regard is that he disclosed that he would show the weapon with which he had fired. This was done by him when he was making a discovery in connection with another offence registered with Gomtipur Police Station vide C.R. No.149 of 1995, for an offence of attempt to murder, so also for an offence under the Arms Act, wherein also, allegedly, attempt to murder was made by firing a shot from a revolver. It would, therefore, be too remote and risky to infer that when the appellant made a statement at the time of discovery that he would show the weapon with which he had fired, what he meant was the weapon used in this particular offence. Panchnama, thus, does not connect the discovery with the present offence. The disclosure, therefore, is too vague to connect the appellant with the concealment of the weapon. It is yet more vague and remote to connect the appellant with use of the weapon in present incident.

14.8 In the case of ***Narsinhbhai Dahyabhai Vaghela v. State of Gujarat, reported in 1984(1) GLR 118***, this Court observed thus :-

'.....When Panchnama was to be prepared accused was present and he stated that “he willingly shows a key”. This would only mean knowledge of the key and not the possession of the key. Possession and knowledge are two different aspects in law. For establishing possession the statement under Section 27 of the Indian Evidence Act would have “I have concealed a key or I have placed a key which I am willing to produce”. Unless it is an admitted fact that it is he who has placed it possession cannot be imputed to him. Production can impute knowledge. If a person has a knowledge that a particular thing is lying at a particular place, that will only establish that he knew that at a particular place a particular thing is lying. This would impute knowledge and not possession.”

14.9 In ***Dudh Nath Pandey v. State of U. P., AIR 1981 SC 911***, the Apex Court took into consideration a very similar fact-situation and observed in paragraph 15 that, if the case is dependent on circumstantial evidence, different considerations would have prevailed because the balance of evidence after excluding the testimony of the two eye-witnesses was not of the

standard required in cases dependent wholly on circumstantial evidence (as is the case here). Their Lordships observed that evidence of recovery of pistol at the instance of the appellant cannot by itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery was found to be vague to identify the authorship of concealment and it was held that pointing out of the weapon may, at the best, prove the appellant's knowledge as to where the weapon was kept. In that case also, there was evidence of ballistic expert and it was observed that the evidence of ballistic expert carried the proof of the charge, a significant step ahead, but not near enough, because, at the highest, it showed that the shot which killed the victim was fired from the pistol which was pointed out by the appellant. Their Lordships observed that evidence surrounding discovery of pistol may not be discarded as wholly untrue but it left a few significant questions unanswered and created a sense of uneasiness in the mind of a Criminal Court. The questions that worried the Supreme Court were how could the appellant have an opportunity to conceal the pistol in broad-day light on a public thoroughfare. If he reloaded the pistol as a measure of self-protection, as suggested by the prosecution, why did he get rid of it so quickly by throwing it near Hathi Park itself and how then Ram Kishore, who had already deposed in seven different cases in favour of the prosecution, to witness the discovery of the pistol.

14.10 We may now refer to the decision of the Apex Court in ***State of Maharashtra v. Suresh, (2000) 1 SCC 471***. In that matter, while considering the three possibilities when the accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by him and where the accused does not indicate that he had seen somebody else concealing it or that he had been told by another person that it was concealed there, a presumption would be well founded that the accused was the author of concealment.

14.11 We are faced with a situation here that the discovery Panchnama does not indicate that the accused stated that the muddamal firearm was concealed by him. We are also faced with a situation where the accused has not indicated the other two possibilities, namely, that he saw somebody concealing it or that he was told by someone that it was concealed there. In light of the above referred decision in the case of *State of Maharashtra v. Suresh*, an inference has to be drawn that the appellant was the person who concealed the weapon. Resultantly, the evidence of discovery would lead only to a situation where it can be said that the appellant concealed the weapon at the place from which it was recovered at his instance.

15. We have with us ballistic expert's report which clearly indicates that the weapon, muddamal Article No.28, recovered at the instance of the appellant was the weapon which was used in firing bullet on the deceased. For that purpose, the bullets recovered from the place of incident and from the dead body and a test bullet fired from the weapon were compared and were found to have almost identical firing marks. We have no reason not to accept this report. Learned Advocate for the appellant also does not challenge this proof. But the contention that is raised is that there is no evidence that the weapon was used by the appellant nor are there circumstances to lead to an infallible and legitimate inference that only the appellant could have used the weapon in commission of the crime in question. For that purpose much emphasis is laid by the learned Advocate on the fact that the incident occurred on 1st October, 1994, the appellant was arrested in another offence in May, 1995 and the alleged discovery is in November, 2005. The discovery is, therefore, after about 13 months of the incident and after a period of about six months of arrest of the accused.

15.1 There is no material whatsoever brought on record to show as to what led the Investigating Officer to reopen the case, arrest the prisoner in the present case and then record the statements of witnesses before whom, allegedly, extra-judicial confession was made and the possession of the weapon was taken

by the appellant after a short spell of concealment.

15.2 We also find substance in the contention and the learned Additional Public Prosecutor is also unable to controvert the submission that there is no evidence whatsoever to show that the weapon was used by the appellant in commission of the present crime. The discovery is not supported by independent witnesses, but is proved through the Investigating Officer. It is only on the basis of decision in case of *(supra)* that an inference can be drawn that the appellant was the person who concealed the weapon. But, if we consider the time lag between the date of incident and the date of recovery at the instance of the accused and between the date of arrest and the date of recovery at the instance of the accused, we feel that it would be stretching the imagination too far and considering too remote circumstances to infer that because it was discovered by the appellant, it was used by him. It would be a risky presumption rather than a legitimate and infallible inference from the circumstances.

15.3 We may take judicial notice of the fact that the appellant was alleged to have involved himself in two other offences allegedly committed by him on 17th May, 1995 and 31st July, 1995. We also understand that, in both these offences, after the trial, the appellant came to be acquitted. Though these facts may not be

directly relevant for decision of this case, but the fact remains that the appellant was in custody from 5.5.1995 in connection with Gomtipur Police Station C.R. No.149 of 1995. The Panchnama relied upon in the present case was drawn in connection with Gomtipur Police Station C.R. No.149 of 1995, which was drawn on 14th November, 1995 and between 5th May, 1995 and 14th November, 1995, he is alleged to have used the weapon in two other cases, as indicated above.

16. We are, therefore, of the view that, though the evidence relating to discovery Panchnama may lead to a presumption that the weapon was concealed by the appellant, it certainly cannot lead to a legitimate inference that it was used by him in the present offence. All that he has stated at the time of Panchnama is that he had fired a short with the weapon. It has to be remembered that the Panchnama was drawn during investigation of another offence (Gomtipur C.R. No.149 of 1995). And by no stretch of imagination can it be said that the appellant has indicated use of the weapon by him in this offence. Thus, the best that can be said is that the ballistic expert's report carries the case of the prosecution further from concealment of the weapon by the accused but not so near to the accused so as to infer that the weapon was used by the appellant. For basing a conviction on the basis of circumstantial evidence, the prosecution has to establish each and every

incriminating circumstance clearly by adducing reliable and clinching evidence and these circumstances so proved must form a complete chain of events from which an irresistible conclusion about the guilt of the accused can safely be drawn leaving no scope for any other hypothesis against the guilt. If one of the links is found to be weak or missing, the chain of circumstances would get snapped and the other circumstances, howsoever strong, cannot establish the guilt of the accused beyond all reasonable doubts. Reference may be had in this regard to *Jaharlal Das v. State of Orissa, (1991) 3 SCC 27 and Tanviben Pankajkumar Divetia v. State of Gujarat, AIR 1997 SC 2193.*

16.1 We may also refer to the decision in the case of ***Pohalya Motya Valvi v. State of Maharashtra, AIR 1979 SC 1949***, where Their Lordships refused to believe the prosecution case of the accused-appellant giving information to the P.S.I. leading to discovery of the spear considering the fact that the appellant was in custody of Police Patil for nearly 48 hours.

16.2 We may once again refer to *Dudh Nath Pandey v. State of U. P.* (supra) where a very similar situation was considered by the Apex Court, namely, recovery of weapon at the instance of the accused and evidence of ballistic expert to the effect that the weapon was used in commission of the crime, and Their Lordships

have observed that discovery of a weapon would not necessarily point out that the weapon was wielded in the offence by the accused. The evidence of ballistic expert that the weapon was used in commission of the crime was held to be good enough in the facts of that case to carry the proof of the charge a significant step ahead, but not near enough, because at the highest, it was held that it would show that the shot which killed the victim was fired from the pistol which was pointed out by the accused. The questions that were not answered and appealed to Their Lordships were how could the appellant have an opportunity to conceal the pistol in a broad-day light on a public thoroughfare. In the instant case, the question is how could the appellant have concealed the weapon, if he was in custody prior to 5.5.1995 till discovery, i.e. on 14th November, 1995 and, allegedly, he used the weapon on 17th May, 1995 and 31st July, 1995 in two different other offences. There is no evidence of presence or absence of finger prints of the appellant on the weapon. Although witness Rajesh Amrutlal Parmar (Exhibit 40) claimed that he saw the incident, he could not identify the assailant at the time of T. I. parade. All these factors lead us to conclude that the prosecution has failed to establish a complete chain of circumstances linking the appellant with the offence. The gap between recovery, discovery and presumed concealment by the accused and use of the weapon in commisison of the offence is not bridged by any evidence to show that it could

be the appellant and the appellant alone who could have used the weapon in commission of the crime. The evidence and the circumstances do not rule out the hypothesis of innocence of the appellant.

17. While going through the judgment of the Trial Court, we find that the Trial Court proceeded on a presumption that because it was discovered by the appellant and because there is evidence that the weapon was used in commission of the crime, it was the appellant who used it in commission of the crime. Besides the factors indicated above , there are several other factors which also deserve consideration, namely, that there is no evidence to show that the premises from which the weapon was discovered was exclusively in possession or under control of the appellant, that there was no other person who could have had the knowledge of existence of the weapon at the place from which it was discovered and there is contrary material on record indicating that there were other persons who were in occupation of the house. The Investigating Agency has not recorded statement of any of these persons nor are they cited as witnesses.

18. It also deserves consideration that, according to the prosecution, a conspiracy was hatched by a group of persons and three of whom came to be charge sheeted. One of the three

persons charge sheeted applied for discharge and was discharged. Out of the two persons tried, one has been acquitted, although the prosecution case is that the accused, who was acquitted, in company of the appellant, had gone to the place on a motorcycle and fired shots at the deceased. If the very foundation or genesis of the prosecution case is not proved by the prosecution, then we deem it very risky to infer involvement of the appellant in the offence on basis of remote and non-existent circumstances and confirm the conviction.

19. In our opinion, the Trial Court ran into an error in holding that the prosecution was successful in establishing the case against the accused for murder and recording conviction for offence of murder.

20. However, so far as offence under the Arms Act is concerned, since we have come to a conclusion that the discovery of weapon by the appellant is duly established by the prosecution and that the appellant having failed to indicate that he derived the knowledge by seeing somebody else concealing the weapon or on being informed about concealment by someone, it was the appellant who concealed the weapon, which was not a licenced weapon. We are of the view that the conviction under the provisions of the Arms Act cannot be said to be erroneous and that part of conviction has

to be upheld.

21. In the result, the appeal is partly allowed. The judgment and order of the Trial Court convicting the appellant under the provisions of the Arms Act is hereby confirmed. The conviction of the appellant for the offence of murder under Section 302 of I. P. C. is set aside. The appellant is ordered to be set at liberty forthwith, if not required in any other case.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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